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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

DAN MORALES, AS ATTORNEY GENERAL FOR THE STATE OF TEXAS, AND ALBERT ENDSLEY, AS TEXAS CONSUMER CREDIT COMMISSIONER,

Petitioners,

v.

FIRST GIBRALTAR BANK, FSB, AND BENEFICIAL TEXAS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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July 1994

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QUESTION PRESENTED

WHETHER TEXAS' CONSTITUTIONAL AND STATUTORY PROVISIONS PROTECTING HOMESTEADS FROM FORECLOSURE AND FORCED SALE ARE FEDERALLY PREEMPTED WHEN NEITHER FEDERAL STATUTES NOR REGULATIONS ADDRESS STATE HOMESTEAD PROVISIONS, AND WHEN ANY PREEMPTION IS DISCERNIBLE ONLY IN A DEPUTY GENERAL COUNSEL'S INTERPRETIVE LETTER, ISSUED WITHOUT OPPORTUNITY FOR NOTICE OR COMMENT.

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Dan Morales, as Attorney General for the State of Texas, and Albert Endsley, as Texas Consumer Credit Commissioner (together, the "State"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 19 F.3d 1032 and at Appendix (page numbers designated "A") (separately bound and filed herewith) at A-1. The opinion of the United States District Court for the Western District of Texas is reported at 815 F. Supp. 1008 and reproduced at A-48.

JURISDICTION

The court of appeals entered judgment on April 29, 1994. (A-1). There was no petition for rehearing. Upon the State's motion, the court of appeals stayed issuance of its mandate pending resolution of this petition for writ of certiorari. The State invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1)(1988).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article XVI, section 50 of the Texas Constitution (A-68), TEX. PROP. CODE ANN. § 41.001 (Vernon Supp. 1994) (A-69), and CODE ANN. § 41.002 (Vernon Supp. 1994) (A-69), establish Texas' homestead exemptions.

The authority of the Federal Office of Thrift Supervision ("OTS") to regulate federal savings associations (such as respondent First Gibraltar Bank, FSB ("First Gibraltar") is established by 12 U.S.C. §1464(a) (Supp. IV 1992) (A-71). 12 U.S.C. § 1464(c)(1)(B) (Supp. IV 1992) (A-71), provides, in part, that "a Federal savings association may invest in, sell, or otherwise deal in . . . [l]oans on the security of liens upon residential real property." 12 U.S.C. § 3803(a)(3)(Supp. IV 1992)), (reproduced App. A-72) provides in part that "housing creditors" (such as respondent Beneficial Texas, Inc. ("Beneficial")) may make alternative mortgage transactions only to the extent that lawful OTS regulations permit federally

chartered savings associations to enter into such transactions; and 12 U.S.C. § 3803(c)(1988) (A-73) provides, "An alternative mortgage transaction may be made by a housing creditor in accordance with this section, notwithstanding any State constitution, law or regulation."

12 C.F.R. § 545.2 (1994) (A-74) provides that OTS regulations preempt state law respecting "the operations of Federal savings associations . . .." 12 C.F.R. § 545.33(f) (1994), (A-75), gives "housing creditors" the authority to "make alternative mortgage transactions . . . notwithstanding any state constitution, law or regulation." 12 C.F.R. § 545.32(c) (1994) (A-74) defines the term "loan . . . made on the security of real estate" to require, among other things, that the security underlying such loan "may be enforced as a real estate mortgage or its equivalent pursuant to the law of the state in which the property is located."

STATEMENT OF THE CASE

A. The Federal Statutory and Regulatory Background

No federal law or regulation expressly addresses whether the federal statutes and regulations governing federal savings associations extend to the preemption of state homestead laws. From 1933 until 1989, the Federal Home Loan Bank Board ("FHLBB"),[1] and since 1989, OTS, have promulgated regulations

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[1] *See* Home Owners' Loan Act, as amended, 12 U.S.C. §§ 1461-70 (1988 & Supp. IV 1992)("HOLA"). HOLA, as enacted in 1933, provided for federal savings associations to be regulated by the Federal Home Loan Bank Board. Amendments to HOLA in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101-73, 101 Stat. 183 (1989) (codified at scattered sections of 12 U.S.C. and 15 U.S.C.) ("FIRREA") dissolved the FHLBB and shifted its regulatory responsibilities relevant to this case to a newly-created OTS, headed by a Director. *See* 12 U.S.C. § 1462a(a and b)(Supp. IV 1992); 54 Fed. Reg. 49411 (1989) (codified, 12 C.F.R. ch. V); 815 F. Supp. at 1013 (A-58). While some of the regulations at issue here were promulgated by the FHLBB and others by OTS, none of the relevant regulations has

"respecting the organization, incorporation, examination, operation, and regulation of . . . Federal savings associations," 12 U.S.C. § 1464(a) (Supp. IV 1992), and codified these rules in part 545 of title 12 of the Code of Federal Regulations. 12 C.F.R. § 545.32 (1994) limits the types of loans that federal savings associations such as First Gibraltar can secure with residential and non-residential real estate. 12 C.F.R. § 545.32(c) (1994) defines the term "loan . . . made on the security of real estate," and further provides that the security interest underlying such loan is enforceable *"pursuant to the law of the state in which the property is located."* 12 C.F.R. § 545.32(c)(2) (1994) (A-74) (emphasis added). Under the Parity Act,[2] financial institutions such as Beneficial can issue and enforce AMTs notwithstanding contrary state laws to the extent that OTS permits federal savings associations to do so.

B. The Law Suit

Invoking the trial court's jurisdiction under 28 U.S.C. § 1331 (1988), First Gibraltar and Beneficial sued the State in federal district court to obtain authority to make, purchase and enforce two types of AMT secured by liens on Texans' homesteads. 815 F. Supp. at 1009. They sought a declaration that the HOLA, the Parity Act, and regulations of the OTS

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materially changed. OTS adopted and recodified the FHLBB regulations relevant to this case. *See* 54 Fed. Reg. 49411 (1989).

[2] *See* Alternative Mortgage Transaction Parity Act, Pub. L. 97-320, 96 Stat. 1545, as amended, 12 U.S.C. §§ 3801-06 (1988 & Supp. IV 1992) ("Parity Act"). The Parity Act gives statutorily defined "housing creditors," such as Beneficial, the same authority to use alternative mortgage transactions ("AMTs") to secure repayment of credit that OTS regulations extend to federal savings associations, such as First Gibraltar. 12 U.S.C § 3803 (1988 & Supp. IV 1992) (A-72). An OTS regulation provides that housing creditors may make AMTs notwithstanding contrary provisions of state constitutions, laws or regulations. 12 C.F.R. § 545.33(f) (A-75).

preempted Texas' constitutional and statutory homestead protections to permit First Gibraltar and Beneficial to make, enforce and transfer those two types of AMTs. They contended that OTS had exercised its statutory authority to permit savings associations to make and enforce such AMTs, so that under the Parity Act, First Gibraltar and Beneficial had concomitant rights. First Gibraltar and Beneficial also sought a permanent injunction against the State's enforcement of Texas homestead provisions that would prevent First Gibraltar and Beneficial from perfecting, enforcing or transferring such AMTs other than as purchase-money security interests in Texans' residences.

C. The District Court Decision

The district court granted summary judgment for the State, concluding that the federal laws and regulations did not reflect a clear intent to preempt Texas homestead exemption laws. The district court held that, as to the reverse annuity mortgages and line of credit conversion mortgages HOLA, the Parity Act, and regulations of the OTS did not preempt Texas' state constitutional and statutory prohibitions against the enforcement of non-purchase money mortgages upon Texans' homesteads.

The district court construed article XVI, § 50 of the Texas Constitution (A-68) and Texas Property Code section 41.001 (A-69) as voiding liens created by non-purchase money AMTs, such as those that First Gibraltar and Beneficial proposed, on Texas homestead property. 815 F. Supp. at 1010 (A-50). The court recognized OTS' authority to adopt preemptive regulations, and that OTS had by regulation preempted several aspects of state law relating to AMTs. Yet, the district court concluded that OTS regulations did not preempt Texas' homestead exemptions respecting the enforcement of alternative mortgage transactions because an OTS regulation "expressly provides that state law determines whether a loan on residential property is secured." 815 F. Supp. at 1014 (A-66) (footnote omitted), *citing* 12 C.F.R.

§ 545.32(c) (1994) (A-74) (security interest in real estate enforceable pursuant to state law). The district court therefore reasoned, "[s]ince the regulations specifically incorporate Texas law to determine whether a loan is secured in Texas, it is undeniable that the regulations promulgated pursuant to the [OTS] Director's authority under the HOLA were not intended to and do not preempt Texas homestead law." 815 F. Supp. at 1014 (A-62).

The district court reached this conclusion despite a letter by FHLBB's deputy general counsel in 1989 (A-77), opining that the regulations did preempt Texas homestead laws. Although the district court believed that the deputy general counsel's letter was "entitled to deference unless it is unreasonable," 815 F. Supp. at 1015 (A-63), the court declined to defer to the letter because it was "unreasonable given the unambiguous language of 12 C.F.R. § 545.32(c)[(2)] (1992) [security interest enforceable pursuant to state law]." *Id.* (bracketed material added).

D. The Court of Appeals Decision

The Fifth Circuit reversed, concluding that pursuant to the HOLA and the Parity Act, OTS had the statutorily delegated authority to preempt state homestead exemption laws. 19 F.3d at 1040-44 (A-15-24). The court also decided that the OTS had effectively exercised its authority to preempt state homestead exemption laws. The court reached this conclusion by collecting the various FHLBB and OTS regulatory provisions that did bespeak preemption, although none of these provisions mentions state homestead exemptions. 19 F.3d at 1041-42 (A-15-18).

The court also concluded that under the Parity Act, if a federal savings bank such as First Gibraltar could enforce secured alternative mortgage transactions in contravention of Texas' homestead exemptions, so too could other housing lenders such as Beneficial. 19 F.3d at 1043-44 (A-22-23).

Finally, the court of appeals concluded that, even though FHLBB's superseded regulations and OTS' current regulations were vague respecting preemptive intent, read together the FHLBB and OTS regulations manifested an intent to preempt Texas' homestead laws as to the enforcement of the AMTs at issue from before 1982, and that nothing in subsequent regulatory provisions manifested a purpose to end that preemption. 19 F.3d at 1045 (A-25-26). The court reached this conclusion while acknowledging the "the current regulations governing federal savings associations are unfortunately *vague* on the topic of preemption," 19 F.3d at 1044 (A-24) (emphasis added), because "[a]ny ambiguity regarding agency intent arising from the text of the regulations themselves may be dispelled by reasonable agency constructions of the regulations." 19 F.3d at 1045 (A-25) (citation omitted).

REASONS FOR GRANTING THE PETITION

This case presents questions purely of law, but these questions raise issues fundamental to the proper balance of federal and state powers and to the power of mid-level federal bureaucrats to dictate substantive law to federal courts.

These important questions are: Whether vague OTS regulations allowing federal savings associations and state-chartered loan companies to make AMTs, and preempting state constitutions and laws respecting the "operations" of these institutions, preempt state constitutional and statutory provisions governing when homes within that state can be subjected to foreclosure or involuntary sale; and whether a federal court must defer respecting the preemption question to a federal agency attorney's advisory letter, opining that these vague regulations accomplished preemption, even if the court believes the letter to be flawed in fundamental respects.

As detailed below, the fact that this Court has already granted certiorari respecting the degree of required judicial deference to informal agency interpretations in contexts other than preemption of state law demonstrates the fundamental importance of the deference issue. Here, that issue's importance is heightened when preemption of state law is the focus of the informal agency opinion, because the opinion thereby affects not just the proper functions of the federal government, but the proper balance of federal and state governmental powers as well. Indeed, as also detailed below, the court of appeals' opinion in this case creates a direct conflict respecting judicial deference to informal agency interpretations between the Fifth Circuit and the Tenth Circuit.

A. The Fifth Circuit's Erroneous Deference to An Admittedly Flawed Advisory Letter from an Agency Attorney Respecting Preemption of State Law Raises an Important Issue Respecting the Proper Federal-State Balance of Power.

This Court has already recognized the fundamental need to resolve when a federal court must defer to an informal agency interpretation of the law it administers. In 1992, this Court granted certiorari and summarily remanded a case for reconsideration of statutory interpretation by the Court of Appeals for the Seventh Circuit in light of an informal memorandum by the Environmental Protection Agency Administrator expressing his view of the statute in question. *See City of Chicago v. Environmental Defense Fund*, 113 S. Ct. 486, 487 (1992)(mem.). When the Court again considered *City of Chicago*, it resolved the merits on other grounds, and therefore considered it unnecessary then to determine "whether an agency interpretation expressed in a memorandum like the [Environmental Protection Administration] Administrator's in this

case is entitled to any less deference under Chevron[3] than an interpretation adopted by rule published in the Federal Register, or by adjudication." *See City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1594 n.5 (1994) (footnote within quotation added). *See also Ludwig v. Variable Annuity Life Ins. Co.*, 114 S. Ct. 2161 (1994), *granting cert. to review*, 998 F.2d 1295 (5th Cir. 1993), *reh'g denied*, 13 F.3d 833 (5th Cir. 1994), *rev'g* 786 F. Supp. 639 (S.D. Tex. 1991) (extent to which statutory interpretations by the U.S. Comptroller of the Currency are entitled to judicial deference where statute being interpreted assertedly clear and Comptroller assertedly issued inconsistent interpretations).

The instant case once again squarely presents this important issue to the Court: When should a federal agency be permitted by informal expressions of its bureaucrats' views to bind the federal judiciary? Under the facts here presented, this question goes to the heart not only of the proper scope of federal agency policy making, but also, because the result is preemption of state real property law, to the heart of balance of powers between the states and the federal government under our federal system.

The court of appeals acknowledged that OTS' "current regulations governing federal savings associations are unfortunately *vague* on the topic of preemption" 19 F.3d at 1044 (A-24)(emphasis added) and that "specific references to these particular AMTs in the pertinent regulations are few," 19 F.3d at 1046 (A-30), but erroneously deferred to the 1989 FHLBB deputy general counsel's advisory letter, 19 F.3d at 1047 (A-31), to find that the FHLBB and OTS had a "clear and manifest purpose" to accomplish such preemption. 19 F.3d at 1044 (A-24) (inquiry is whether FHLBB/OTS had "clear and manifest

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[3] *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984) (Court accords "considerable weight" to formal "legislative regulations" of a federal agency construing statutory scheme the agency administers).

purpose" to preempt). The court below felt compelled by circuit precedent to defer to the letter, *see Gavey Properties/762 v. First Fin. Sav. & Loan Ass'n*, 845 F.2d 519, 521 (5th Cir.1988) (19 F.3d at 1047; A-31), even while admitting that the letter was "not without its flaws," 19 F.3d at 1048 (A-32); that it failed to address key issues of Texas law or a key FHLBB regulation, 19 F.3d at 1047-48 (A-32) ("Notably absent is any reference to state law or § 545.32(c)(2)"); and omitted discussion of congressional action inconsistent with preemption. 19 F.3d at 1048-49 (A-34-36). Moreover, the court of appeals conceded that the deputy general counsel took no position respecting preemption respecting AMTs by state-chartered lenders such as Financial here. 19 F.3d at 1044 (A-24). In addition, the letter also failed to address the strong Texas interest in its homestead protection scheme that this Court considered determinative in *United States v. Yazell*, 382 U.S. 321 (1966).

Even if this flawed informal letter could be considered an "agency's" interpretation of its regulations, rather than the expression of an individual lawyer's opinion,[4] the court of appeals should not have deferred to the letter under the standards established by the decisions of this Court respecting judicial deference to agency opinions.

The court of appeals should have distinguished, but did not, between the minimal deference due to an informal expression of an agency functionary's opinion, such as the letter, and the substantial deference properly due to formal agency regulations interpreting statutes that an agency administers. *Compare Chevron*, 467 U.S. at 843-45 (Court accords "considerable weight" to formal "legislative regulations" of a federal agency construing statutory scheme the agency administers) *with City of Chicago*, 114 S. Ct. at 1594 n.5 (noting open question whether informal agency

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[4] In *City of Chicago*, the informal expression of the EPA's statutory interpretation was at least articulated by the EPA's director. By contrast, here the advisory letter emanated from an agency deputy general counsel.

opinions entitled to same deference as regulations or formal adjudicatory decisions).

The court of appeals failed to apply this Court's standards as to when courts should defer to official agency statutory interpretions. *See* 19 F.3d at 1047 (A-30-31) (*citing, inter alia, Weber v. Heaney*, 793 F. Supp. 1438, 1455 (D. Minn. 1992) (collecting Supreme Court decisions), *aff'd on other grounds*, 995 F.2d 872 (8th Cir. 1993).[5]

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[5] The case-law factors weigh heavily against deference to the FHLBB deputy general counsel's letter in this case, even if the letter represented an official agency position. These factors are as follows: (1) Whether the agency has maintained its position consistently, even if infrequently. *See Haig v. Agee*, 453 U.S. 280, 293 (1981). Here, until this lawsuit, neither FHLBB nor OTS took any position as an agency, while Texas continued to enforce its homestead laws for some 10 years after FHLBB supposedly preempted them in part. Thus, FHLBB and OTS both consistently tolerated state practice which violated the position espoused in the letter; (2) Whether the agency interpretation is of long standing. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); the letter was issued in 1989, only three years before this case commenced in 1992; (3) Whether the public has relied on the interpretation. *See Udall v. Tallman*, 380 U.S. 1 (1965). Here, no financial institution has purported to extend, and no member of the public has obtained, credit in reliance on the letter. Indeed, the letter appears to have been unknown to the public. In a special provision of the federal Technical and Miscellaneous Revenue Act of 1988, Pub. L. 100-647, 102 Stat. 3342, § 105(c)(8) (Nov. 10, 1988), codified at 26 U.S.C. § 163(h)(4)(C) (Supp. IV 1992), Congress permitted Texas taxpayers to deduct interest payments on consumer loans secured by invalid deeds of trust on consumers' residence, up to the amount of the equity in a respective consumer's home. The legislative history of this provision shows that Congress passed it precisely to avoid unfairly penalizing Texans respecting tax deductions simply because of the state's homestead exemption. *See* S. Rep. No. 445, 102nd Cong. 2d Sess. (1988), *reprinted*, 1988 U.S.C.C.A.N. 4515, 4516. The court of appeals appears to refer to this legislation when in its opinion it says, ". . . the persuasive force of the FHLBB Letter is not enhanced by the agency's failure to consider these acts of Congress suggesting the continued validity of Texas homestead law . . .." 19 F.3d at 1049 (A-36); (4) Whether the interpretation involves a matter of public controvesrsy. *See United States v. Rutherford*, 442 U.S. 544, 545 (1979). Since 1979, the banking community has tried unsuccessfully to abolish Texas' homestead laws. This is a subject of bitter political debate within Texas; (5) Whether the interpretation is based on an

B. This Court Should Resolve a Split Among the Circuits Respecting the Degree of Judicial Deference to Be Accorded to Informal Expressions of Agency Opinion, Particularly Respecting Preemption of State Law.

The decision below, requiring judicial deference to an advisory letter from an agency deputy general counsel, respecting regulatory preemption of state law, creates a conflict between the

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agency's expertise in a complex area. *See Aluminum Co. of Am. v. Central Lincoln People's Util. Dist.*, 467 U.S. 380 (1984). Of course, the interpretation construed federal banking laws, a matter within FHLBB's expertise. But, as the court of appeals noted, the letter failed to consider Texas state law and history. Texas traditions, the state's interest in preserving its traditional homestead exemptions, and the proper balance between federal and state regulation are not subjects within FHLBB's special expertise. *See Colorado Pub. Utils. Comm'n v. Harmon*, 951 F.2d at 1579. Moreover, also as noted by the court of appeals, the letter's treatment of FHLBB's own regulations was flawed; (6) Whether the agency has rulemaking authority. *See FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 793 (1978). Even if the FHLBB had rulemaking authority, the State's primary complaint is that the agency chose not to exercise that authority, and has instead purported to act only through an informal letter; (7) Whether Congress knew of and failed to repudiate the agency interpretation. *See Zemel v. Rusk*, 381 U.S. 1, 11 (1965). There is no evidence that Congress is aware of the advisory letter's interpretation. However, Congress has adopted legislation *inconsistent* with preemption of Texas homestead laws by the FHLBB and OTS: as noted above, in 1988 Congress amended the Internal Revenue Code to permit Texas taxpayers to deduct interest on second mortgage loans, even if the associated mortgage was unenforceable under Texas homestead law; (8) Whether the agency has expressly addressed the application of the statute to the proposed issue. *See Investment Co. Inst. v. Camp*, 401 U.S. 617, 627-28 (1971). Until this lawsuit only the letter existed - and the letter failed to discuss the Texas laws; (9) Whether the agency interpretation was contemporaneous with the passage of the statute, 19 F.3d at 1047. The HOLA was enacted in 1933. The letter is dated in 1989; (10) the thoroughness, validity, and consistency of the agency's reasoning. *See Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). According even to the court of appeals, the letter's reasoning is flawed and incomplete.

courts of appeals for the Fifth Circuit and the Tenth Circuit. In *Colorado Pub. Utils. Comm'n v. Harmon*, 951 F.2d 1571, 1579 (10th Cir. 1991), the Court of Appeals for the Tenth Circuit held that judicial deference to agency interpretations respecting preemption was inappropriate, reasoning that preemption is primarily an issue of law, "more within the expertise of the courts than within the expertise of [an agency]"). The court of appeals below acknowledged that in *Harmon* the Tenth Circuit disagreed with Fifth Circuit precedent in this regard. 19 F.3d at 1047 (A-31). *See also Koray v. Sizer*, 21 F.3d 558, 562 (3d Cir. 1994) (internal U.S. Bureau of Prisons guidelines respecting statutory interpretation for computing prisoners' good-time credit not entitled to same deference as published regulations); *Marshall v. Rosemont, Inc.*, 584 F.2d 319, 321 (9th Cir. 1978) (no "conclusive mystique" in agency's informal publications).

C. The Court of Appeals' Rationale for Finding Preemption of State Homestead Laws Based Upon Regulations Admittedly Vague as to Intent to Preempt Threatens to Alter the Balance of Federal/State Powers.

Preemption should not be accomplished inadvertently. Clarity and specificity are necessary both to inform federal agencies of the subjects for which they are responsible and to give states and members of the public fair notice of applicable law.

Federal agency functionaries should not be permitted extra-legally to effectuate their personal agendas respecting substantive law by changing the law through informal administrative devices such as the FHLBB deputy general counsel's letter here. (A-77 *et seq.*). Such letters evade the requisite open debate, whether the forum for such debate be Congress, *see Chevron*, 467 U.S. at 866, or the notice and comment phase of formal rulemaking, *see* 5 U.S.C. § 553 (1988) subsecs. (b) (public notice of proposed rules) and (c) (opportunity

to comment on proposed rules). Thus, bureaucrats who are not answerable to the public try to effect preemption while evading the expression of legitimate state concerns respecting preemption. This increasingly common administrative practice constitutes preemption by stealth. It will continue unless this Court condemns it and restores the proper balance of federal and state powers.

There is a compelling need for review of this case by this Court. Here, OTS obtained the Fifth Circuit's ratification of OTS' secret preemption of Texas' family property laws. No subject more directly touches upon the American Dream. In few other fields of law has this Court been more deferential to the legitimate regulatory interests of states. *See Yazell*. While the court of appeals attempted to keep its decision narrow (applicable only to two types of AMTs), the court's approach to preemption, and the logical reach of its decision, threaten to upset the proper balance of federal and state powers: OTS can now assert that in hindsight the vague 1984 FHLBB regulation preempted a broad range of state laws regulating home ownership, secured transactions, and the public health and safety whenever federal savings associations or other housing creditors are operating.

The decision below allows any federal agency, as did FHLBB and OTS here, to adopt a vague, general regulation within the scope of its subject matter jurisdiction, and later informally opine that such regulation preempted a traditionally state-regulated field of law that incidentally affects the same subject matter as the general federal regulation.

Federal preemption of state laws respecting matters traditionally regulated by the states can only be accomplished through specific federal laws or regulations that accomplish that result. *Yazell* (Texas homestead law not preempted absent specific federal statute or regulation). The primary responsibility for overruling questionable federal agency actions, and thereby reconciling "competing views of the public interest," rests with the "political branches" rather than the judiciary. *Chevron*, 467 U.S.

at 866, *quoting TVA v. Hill*, 437 U.S.153, 195 (1978). However, the political branches cannot perform the vital public function of policing the federal bureaucracy if the bureaucracy makes its fundamental rules in secret.

If, as the court of appeals concluded, the 1984 FHLBB regulation did indeed preempt state homestead exemptions on the grounds that such exemptions were state laws "purporting to address the subject of the operations of a Federal association," former 12 C.F.R. § 545.2 (1984), this preemption was a well kept secret. A recent comprehensive legal study mentions no preemption of state homestead laws. *See* Frank S. Alexander, *Federal Intervention in Real Estate Finance: Preemption and Federal Common Law*, 71 N. Car. L. Rev. 293, 323-34 (1993). In no reported case has any federal savings association or other housing creditor asserted preemption to overcome a defense grounded on any state's homestead exemption laws. Congress has enacted tax legislation strongly suggesting that branch of government believes that Texas homestead exemption subsists unpreempted. *See* Technical and Miscellaneous Revenue Act of 1988, Pub. L. 100-647, 102 Stat. 3342, § 105(c)(8) (Nov. 10, 1988), codified at 26 U.S.C. § 163(h)(4)(C)(Supp. IV 1992)(permitting Texas taxpayers to deduct interest payments on consumer loans secured by invalid deeds of trust on consumers' residence).[6] Moreover, in every Texas Legislature session since 1979, financial institutions have attempted unsuccessfully to remove the homestead exemption from the Texas constitution –

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[6] The legislative history of this provision shows that Congress passed it precisely to avoid unfairly penalizing Texans respecting tax deductions simply because of the state's homestead exemption. *See* S. Rep. No. 445, 102nd Cong., 2d Sess. (1988), *reprinted*, 1988 U.S.C.C.A.N. 4515, 4516. The court of appeals appears to refer to this legislation when in its opinion it says, ". . . the persuasive force of the FHLBB Letter is not enhanced by the agency's failure to consider these acts of Congress suggesting the continued validity of Texas homestead law . . .." 19 F.3d at 1049.

and failed. [Texas] House Research Organization, Special Legislative Report: Second Mortgages and the Texas Homestead Exemption 19, 34-35 (Dec. 21, 1988) (R. 3:475). Significantly, the issue of preemption by OTS never arose during these attempts to alter Texas laws.

While the homestead exemption has roots deep in Texas history,[7] this is not just an issue of concern to Texas.[8] The Texas homestead exemption is different in degree, not kind, from other states' exemptions. The main difference is that the Texas exemption is non-waivable.

Moreover, the reasoning of the court of appeals in this case threatens not merely the homestead laws of all states that have such laws, but many additional state laws that arguably "address the subject of the operations of a Federal association," 19 F.3d at 1042 (A-18-19), *quoting* former 12 C.F.R. 545.2 (1984), or which "'*indirectly*' restrict[ ] the ability of federal savings associations to engage in graduated payment or reverse annuity mortgages." 19 F.3d at 1045 (A-25), *quoting* former 12 C.F.R. §

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[7] Texas homestead law is deeply embedded in the state's cultural traditions and legal history. The concept of a homestead — real property that receives special protection because it is the family home — originated in 1829 in the Mexican state of Coahuila y Texas, as Texas was then called. Joseph W. McKnight, *Protection of the Family Home From Seizure by Creditors: the Sources and Evolution of a Legal Principle*, 86 S.W. Hist. Q. 369, 369-70 (1983). The family homestead exemption has been in every Texas constitution since annexation to the Union, and before annexation in Republic of Texas statutes *Id.*, at 391-95.

[8] The family homestead exemption spread from Texas to the other states and beyond. McKnight, *supra*, at 369, 397. More than forty states have some form of homestead exemption today. *See generally*, 7 COLLIER ON BANKRUPTCY, *passim* (L. King ed. 15th ed. 1994)(collecting and discussing state exemption laws).

545.6-4(a)(2) (1982) (emphasis added).[9] For example, virtually all states have filing procedures for perfecting security interests in real property. These requirements would "indirectly" restrict a federal savings association's ability to enforce an unperfected security interest in real property arising from an AMT as against another creditor with a perfected security interest in the same property. The court of appeals' decision would permit such associations to assert the outrageous argument that the seniority of their liens are not subject to state filing laws.

The court of appeals turns this Court's standard for finding preemption on its head. Federal agency regulations are generally presumed *not* to preempt state laws. *See Gregory v. Ashcroft*, 501 U.S. 452, __, 111 S. Ct. 1395, 2401 (1991) (heightened scrutiny and plain statement required before finding preemption affecting federal balance of powers); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (real property law of special concern to states). To accomplish preemption pursuant to a delegation of congressional authority, an agency's regulations must more than merely "touch upon" or "relate to" the subject of the state law. *CSX Transportation, Inc. v. Eastwood*, 113 S. Ct. 1732, 1737-38 (1993) (determining whether Secretary of Transportation's railroad crossing safety standards preempted state standards). "[P]reemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." *Id.* Federal agency regulations will not be found to preempt state laws that have merely an incidental effect within the subject matter encompassed by the federal regulation. *North Dakota v. United States*, 495 U.S. 423, 442 (1990)(military regulations requiring competitive bidding do not preempt state liquor laws that had merely *incidental effect* of increasing military liquor costs).

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[9] The court cited this and other superseded regulations because it concluded that no intervening FHLBB or OTS regulations substantively changed the provisions of the older rules. *See* 19 F.3d at 1045 (A-26).

The underpinning of the court of appeals' opinion was that any state laws impinging on federal savings associations' "operations" are invalid. Such laws are not limited to homestead exemptions. States regulate the "operations" of federal savings associations just as they do other businesses, in a number of ways, ranging from zoning regulations, building and fire codes, health inspections, and even speed limits for financial institutions' vehicles. Such necessary and proper regulations more directly affect the institutions "operations" than do homestead exemptions. The approach of the court of appeals in this case to the issue of preemption by vague regulations places in question the validity of these legitimate state regulatory measures.

Texas' homestead exemption does not even relate directly to the "operations" of federal savings associations. The homestead exemption merely restricts a home owner's ability to alienate an interest in real property. If the "vague" OTS regulations could preempt a state's homestead exemption on the theory that this restriction relates to federal savings association "operations," then OTS also could assert with equal force that the same general and vague OTS regulation has preempted state laws that establish the priority of liens in the order in which they are perfected under state law procedures. Under the court of appeals' reasoning, relegating a federal savings association's security interest in real property to a second lien merely because another creditor perfected a earlier lien would interfere with the financial institution's "operations." Thus, federal associations, and under the Parity Act other housing creditors, should always be able to take liens on real property senior to the security interests of the land owner's other creditors.

This suggestion is refuted however, by the plain language of 12 C.F.R. § 545.32(b)(4) (1994) (A-75) (enforcement of security interest in real property determined by state law), upon which the district court relied below. The court of appeals describes this regulation as "[t]he fly in the ointment," 19 F.3d at 1046 (A-28), but it is the *only* OTS regulatory provision that on its face relates

to the subject of the homestead exemption. The court interprets section 545.32(b)(4) not to mean what it plainly says based on the provision's "history." 19 F.3d at 1046 (A-28). However, where a law's language is clear on its face, courts should not resort to extrinsic aids in determining its meaning. *See Dewsnup v. Timm*, 112 S. Ct. 773 (1992) (construing Bankruptcy Code provision). This rule of statutory construction should apply equally to the interpretation of formal regulations, which have the force and effect of law. *See Black & Decker Corp. v. Commissioner*, 986 F.2d 60, 65 (4th Cir. 1993) (same canons of construction apply to regulations as to statutes). Significantly, this key regulatory provision was not even mentioned in the 1989 advisory letter upon which the court of appeals also relied, 19 F.3d at 1047-48 (A-32), - a letter which the court conceded was "not without flaws." 19 F.3d at 1048 (A-32).

The OTS regulations are not merely "vague" respecting the preemption of state homestead exemptions, as the court below acknowledged. 19 F.3d at 1044 (A-24). They are non-existent. Not once do the terms "homestead," "exemption," or any equivalent of either, appear in any of the regulatory materials upon which that court relied. The only regulatory language remotely addressing the homestead issue is the text expressing an intent to preempt any state laws "purporting to address the subject of the operations of a Federal association." *See* 12 C.F.R. § 545.2 (1994) (A-74).

In *United States v. Yazell*, 382 U.S. at 349-51, this Court refused to permit the federal Small Business Administration to enforce a note against a Texas married couple where the note would have been unenforceable under Texas laws respecting coverture and homestead exemptions. Resolving the case in terms of "the continuing problem of the interaction of federal and state laws in our complex federal system," 382 U.S. at 342, Justice Fortas wrote the majority opinion, recognizing that Texas has a strong interest in preserving its homestead laws, and asserted,

> no contention will or can be made that the United States may by judicial fiat collect its loan with total disregard for state laws such as homestead exemptions. [Footnote omitted]. Accordingly, generalities as to the paramountcy of the federal interest do not lead inevitably to the result the Government seeks.

382 U.S. at 348-49. The Court therefore held that absent a "specific" law the Court would not find preemption, stressing that "[b]oth theory and the precedents of this Court teach us solicitude for state interests, *particularly in the field of family and family property arrangements*," absent *clear and substantial interests of the National Government, which cannot be served consistently with respect to such state interests, [and which] will suffer major damage if state law is applied.* 382 U.S. at 352 (emphases added).

This Court has construed a FHLBB regulation, which *did* manifest an explicit preemptive intent, to preempt state laws respecting due-on-sale clauses in mortgages, even while recognizing that real property law is a matter of special concern to states, as to which preemption should not lightly be found. *See de la Cuesta*, 458 U.S. at 153-54 (regulation's intent to preempt was "unambiguous" and "unequivocally expressed by the agency"). Unlike the California due-on-sale clause prohibition that this Court found to be preempted by the specific regulations construed in *de la Cuesta*, the Texas homestead exemption is not a term in a loan document issued by a federally chartered institution; it is a limitation on an owner's right to encumber his property or have it subjected to forced sale. That limitation requires no "operations" of the financial institution for its effectiveness, any more than does a state's fraudulent transfer law

— another example of state restraints on the alienation of property. Thus, *de la Cuesta* is not controlling here.[10]

Finally, the OTS regulation that purportedly preempts Texas law would leave significant gaps in the state law that it would displace. Nothing in OTS regulations fills those gaps. There is no federal general common homestead exemption law. *In Re Bubert*, 61 B.R. 362, 366 (W.D. Tex. 1986), *aff'd*, 809 F.2d 259 (5th Cir. 1987). The absence of any substitute substantive law to replace the assertedly preempted law is the strongest evidence that there in fact was no preemption. *See Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 500 (1988) (absence of a federal regulatory scheme to replace state law indicates that congressional intent to preempt is unclear); Alexander, *Federal Intervention in Real Estate Finance: Preemption and Federal Common Law*, 71 N. Car. L. Rev. at 329.

This Court cited the absence of any law replacing the Texas family property laws that the Small Business Administration would have preempted in *Yazell* as a substantial consideration in finding that the state provisions, including homestead exemptions, were not preempted in that case. 382 U.S. at 352-53.

The *Yazell* Court wisely observed that Texas' homestead exemption law does not exist in a vacuum. *Id.* It is but one strand of a complex web of state laws governing property rights. Voiding those laws creates the need to solve the problems that the homestead laws addressed. No federal laws or regulation provides these solutions. For example, Texas is a community property

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[10] In addition, *de la Cuesta* construed a FHLBB regulation that expressly established the law applicable to due-on-sale clauses in mortgages issued by federally chartered financial institutions. There is no such express regulation here. *See* 458 U.S. at 147. Moreover, the FHLBB had explicitly stated in the preamble to the regulation in question that it intended to preempt state laws imposing additional limitations on the enforceability of such due-on-sale clauses. *Id.* The regulations at issue in the instant case are devoid of any similar specificity or clarity.

state. *See* TEX. CONST. art. XVI § 15; TEX. FAM. CODE ANN. §§ 5.01-5.27 (Vernon 1993). Under Texas law as written, neither spouse could grant a non-purchase money security interest in the family homestead. If Texas law is preempted as the court of appeals says, can one spouse grant such a security interest without the consent of the other? In 1966, in *Yazell*, this Court resolved a similar question with the proper solution: State law was not preempted. The Court should reach the same result now.

CONCLUSION[11]

The petition for a writ of certiorari should be granted.

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[11] The State has assumed in this petition that OTS has statutory authority to preempt state homestead protections, and has confined its argument to whether OTS properly exercised that assumed authority. The latter is a far easier question to answer, and permits resolution of this case without addressing the broader question of statutory authority. However, the State's view remains that OTS lacks statutory authority.